

November 19, 2008

**OFFICE OF THE HEARING EXAMINER  
KING COUNTY, WASHINGTON**

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**REPORT AND DECISION**

SUBJECT: Department of Development and Environmental Services File No. **E06G0466A**

**WILLIAM AND PAMELA CURRIER**

Code Enforcement Appeal

Location: 28840 – 210th Avenue Southeast

Appellant: **William and Pamela Currier**  
28840 – 210th Avenue Southeast  
Kent, Washington 98042  
Telephone: (253) 350-0925

King County: Department of Development and Environmental Services (DDES)  
*represented by* **Jeri Breazeal**  
900 Oakesdale Avenue Southwest  
Renton, Washington 98055  
Telephone: (206) 296-7264  
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**SUMMARY OF DECISION/RECOMMENDATION:**

Department's Preliminary Recommendation:	Deny the appeal; allow one month to submit clearing/grading permit application
Department's Final Recommendation:	Deny the appeal; allow one month to submit clearing/grading permit application
Examiner's Decision:	Grant the appeal in part, and deny in part. Allow additional time for submission of a clearing and grading permit

**ISSUES AND TOPICS ADDRESSED:**

- Clearing in excess of 7,000 square feet without a permit
- Grading in excess of 2,000 square feet without a permit
- Clearing in excess of 50 percent of lot area in RA-5 zone

**SUMMARY OF DECISION:**

Appeal of alleged violation of grading without a permit is granted. Appeal of clearing in excess of 7,000 square feet without a permit and in excess of allowed limits in the Rural Area (RA) is denied. Application for permit for site restoration is required.

**EXAMINER PROCEEDINGS:**

Hearing opened:	June 25, 2008
Hearing closed:	June 25, 2008
Hearing re-opened:	July 21, 2008
Hearing closed:	August 28, 2008

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

**FINDINGS, CONCLUSIONS & DECISION:** Having reviewed the record in this matter, the Examiner now makes and enters the following:

**FINDINGS:**

1. On April 18, 2008, the King County Department of Development and Environmental Services (DDES) issued a notice of King County Code violation, civil penalty order, abatement order, notice of lien, duty to notify ("Notice and Order") to William L. and Pamela J. Currier. The property subject to the Notice and Order is located at 28840 210th Avenue Southeast in unincorporated King County. William L. and Pamela J. Currier are the owners of the subject property.

The Notice and Order alleges violation of King County Code sections 16.82.051 and 16.82.150 for clearing of vegetation exceeding a cumulative area of 7,000 square feet (KCC 16.82.150.A.1.a.(3)), clearing exceeding 50 percent of the lot area (KCC 16.82.150.A.1.a.(2)) and grading that produced an area in excess of 2,000 square feet of impervious surface, without a permit (KCC 16.82.C.2).

2. A timely appeal of the Notice and Order was filed by William L. and Pamela J. Currier on May 7, 2008. The appeal denies any violation of the King County Code; denies the clearing of vegetation exceeding a cumulative area of 7,000 square feet; and denies any clearing, grading or increase in impervious surface on the property within the last 20 years.
3. KCC 16.82.050 requires that a permit be obtained from DDES for any clearing or grading, unless specifically exempted by KCC 16.82.051. KCC 16.82.051 allows clearing outside of critical areas and buffers without a permit for:

"Removal of noxious weeds" and  
"Cumulative clearing of less than 7,000 square feet"

KCC 16.82.051.B and C. 3 and 4.

4. Grading is allowed outside of critical areas and buffers without a permit, if the following conditions are met:

- “1. Excavation less than five feet in vertical depth, or fill less than three feet in vertical depth that, cumulatively over time, does not involve more than 100 cubic yards on a single site.
2. Grading that produces less than 2,000 square feet of new impervious surface on a single site added after January 1, 2005. For purposes of this subsection C.2., ‘new impervious surface’ is defined in KCC 9.04.020.”<sup>1</sup> KCC 16.82.051 B. and C. 1 and 2.
5. “Grading” is defined as “any excavation, filling, removing the duff layer or any combination thereof.” KCC 21A.06.565. “Clearing” is “cutting, killing, grubbing or removing vegetation...” by any means. KCC 21A.06.195.
6. The clearing and grading that is in issue encompasses:
  - A. **Clearing.** The cutting of large trees and removal of other vegetation from the area surrounding the Appellants’ residence; from an area adjacent to the neighbor’s residence at the north property line; from an area in the vicinity of the Appellants’ reserve drain field (east of the Appellants’ residence); and from the perimeter of the property.
  - B. **Grading.** Leveling and compacting an area for an accessory building constructed in the northeast corner of the property; parking areas on the west and south sides of the accessory building; and a driveway that provides access to the Appellants’ drain-field and accessory building from Covington-Lake Sawyer Road on the south property line.
7. Appellants contend that grading on the property was approved by building permit B06M2153, issued by DDES for a 1,574 square foot storage building recently erected on the northeast portion of the property. That permit was issued on November 16, 2007 in anticipation of the Appellants’ submission of a separate application for a grading permit. Clearing and grading violations on the property had previously been alleged by DDES staff, and issuance of the storage building permit was being delayed pending resolution of Appellants’ appeal. On November 16, 2007, staff noted that they would be working to resolve the alleged code violations under a separate grading permit, for which Appellants had submitted a request for a pre-application meeting. The building permit for the construction of the 30 foot by 48 foot (1,440 square foot) detached garage/storage building was then issued. The Appellants did not thereafter proceed with the anticipated grading permit application.
8. The Appellants contend that the clearing on their property was mostly the removal of noxious weeds and hazardous trees. There is substantial evidence that Himalayan Blackberry was prevalent on the property, and has been removed by the Appellants. Himalayan Blackberry is listed on King County’s weed lists as an unregulated “Weed of Concern”. However, “noxious weed” is defined by KCC 21A.06.815 as a plant species . . . listed on the state noxious weed list in Chapter 16-750 WAC . . .” Himalayan Blackberry is not listed on the state noxious weed lists contained in Chapter 16-750 WAC.

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<sup>1</sup> Impervious surface" means a hard surface area that either prevents or retards the entry of water into the soil mantle as under natural conditions before development or that causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions prior to development. Common impervious surfaces include, but are not limited to, roofs, walkways, patios, driveways, parking lots, storage areas, areas that are paved, graveled or made of packed or oiled earthen materials or other surfaces that similarly impede the natural infiltration of surface and storm water. An open uncovered flow control or water quality treatment facility is not an “impervious surface”. KCC 9.04.020.V. “New impervious surface means the creation of a hard or compacted surface such as roofs, pavement, gravel or dirt or the addition of a more compacted surface such as the paving of existing dirt or gravel.” KCC 9.04.020.FF.

9. There is substantial evidence that some trees on Appellants' property presented a safety risk to the residences and structures on the Appellants' property and the adjacent property to the north. Clearing of nearby properties for housing developments may have exposed the Appellants' trees to additional wind force. The rocky soil on the Appellants' property is not conducive to the growth of deep roots, resulting in the development of tall trees that are poorly anchored to the soil. One large tree that toppled during a recent severe windstorm broke through the ceiling in Appellants' daughter's bedroom. Other trees and large limbs on Appellants' property and the adjacent right-of-way have fallen onto power lines. It was reasonable for the Appellants to believe that the larger trees on their property presented an "imminent danger to persons or structures", which would qualify them for removal without a permit. KCC 16.82.051.C.6. In the absence of any evidence that the trees removed by the Appellants were well-anchored and healthy, the preponderance of the evidence is that many (if not all) of the trees cut by the Appellants were hazard trees as defined by KCC 21A.06.1331.
10. A sporadically maintained driveway has existed on the subject property since at least the late 1980s, roughly in the form of a semi-circle extending from the Covington-Lake Sawyer Road (Appellants' south property line) to 210th Avenue Southeast (east property line). This driveway has been periodically maintained and improved by the Appellants. The east portion is now expanded, compacted and graveled. The west portion of the driveway is adjoined to a similarly graded area immediately north of the Appellants' property, where the driveway enters 210th Avenue Southeast.

Normal and routine maintenance of a driveway is permitted without obtaining a clearing or grading permit, if the maintenance does not expand the pre-existing improved area. KCC 16.82.051 B. and C.13. It is clear from the evidence that the areas of the driveway and parking area on the Appellants' property have been expanded during the period that Appellants have owned the property. However, the area of driveway and parking area *expansion* does not appear to exceed 2,000 square feet. The addition of gravel to and compaction of the pre-existing driveway constitute maintenance.

The total alleged illegal grading on the Appellants' property, creating impervious surface from packing and gravel, was estimated by DDES at 3,600 square feet. This estimate excludes the primary driveway access to 210<sup>th</sup> Avenue Southeast and any drainfield area. As shown on a copy of the 2007 aerial photo (Exh. 23), the estimate is based upon a 60' x 20' area "A" in the southeast corner of the property (the newly compacted driveway) and a 60' x 40' area on which the new garage/storage building was placed pursuant to building permit B06M2153 (see Finding 7).

11. Removal of invasive vegetation is allowed without a permit if "Cumulative clearing (is) less than seven thousand square feet annually..." KCC 16.82.051 B. and C.7. Emergency tree removal is authorized without a permit "to prevent imminent danger to persons or structures." KCC 16.82.051 B. and C. 6.
12. The cumulative clearing by the Appellants on the subject property subsequent to January 1, 2005, not including the cutting of hazardous trees and clearing required for access, utilities and septic systems, substantially exceeds 7,000 square feet and 50 percent of the lot area.
13. On July 7, 2008 Division I of the Court of Appeals of the State of Washington issued a decision in the case of *Citizens' Alliance for Property Rights v. Sims*, Case No. 59416-8-1. The Court of Appeals determined, in summary, that KCC 16.82.150, which limits clearing on lots of one and one-quarter acre and smaller in the rural area of King County to a maximum of 50 percent of the lot area or 7,000 square feet, whichever is greater, violates RCW 82.02.020. The Court of

Appeals decision reversed a summary judgment entered by the Superior Court in favor of King County, and remanded the case to the Superior Court with directions for entry of a summary judgment in favor of the property owner. However, the Court of Appeals decision has been appealed by King County to the Washington State Supreme Court. Pending outcome of the appeal, the decision of the Superior Court remains in effect and the Court of Appeals decision is not in effect.

#### CONCLUSIONS:

1. Building permit B06M2153 for the construction of a detached garage/storage building did not address or approve any clearing, grading, restoration or site development activities other than those necessary for the erection of the building itself. The parties mutually understood that alleged clearing or grading violations on the site would be separately addressed by the code enforcement appeal process and/or by separate permit. The clearing or grading of any areas outside of the building footprint was not approved by permit B06M2153. The decision in this appeal proceeding addresses the remaining clearing and grading issues on the Appellants' property that are the subject of the April 18, 2008 Notice and Order.
2. Grading on the Appellants' property, including creation of new impervious surfaces, is within exemptions from the requirement for issuance of a clearing and grading permit, based upon the exemption for driveway maintenance, the approval of the building footprint granted by Building Permit No. B06M2153, and the exemption for grading that produces less than 2,000 square feet of new impervious surface on a single site added after January 1, 2005.
3. The cutting of hazardous trees on the subject property was reasonable and lawful to eliminate an imminent danger to persons or structures. However, the Appellants' clearing on the property subsequent to January 1, 2005 exceeded the cumulative total of 7,000 square feet (excluding areas not to be counted in accordance with Finding No. 12). Although trees that present an imminent danger to persons or structures may be cut without a permit, such cutting must be counted when determining whether the 7,000 square foot cumulative limit for clearing without a permit has been exceeded. Therefore, the clearing on the subject property by the Appellants is not exempt from the requirement for issuance of a permit.
4. The clearing by the appellants of their property substantially exceeds the maximum limits on clearing in the rural area set out in KCC 16.82.150. Until determined otherwise by a final judicial decision, KCC 16.82.150 remains in effect and must be applied by DDES and enforced by the Hearing Examiner.
5. DDES has not cited to the Examiner any provision of code or regulation that requires the Appellant to restore the site by re-planting pre-existing types of vegetation if such vegetation is likely to become hazardous in the soil conditions that exist on the property.

#### DECISION:

The appeal by William and Pamela Currier of the April 18, 2008 Notice and Order is granted in part and denied in part, as follows:

The appeal of the violation of grading in excess of 2,000 square feet is granted.

The appeal of the violation of clearing in excess of 7,000 square feet without a permit is denied.

The appeal of clearing vegetation exceeding the cumulative area of 50 percent of a lot in the Rural Area in violation of KCC 16.82.150.A.1 is denied.

The appellants are ordered to submit to King County DDES an application for a clearing and grading permit to restore vegetation to the site. Restoration need not include planting of trees similar to the hazard trees that were cut to eliminate imminent danger to persons and property.

To comply with this order, the appellants shall schedule a pre-application meeting to be held not later than **January 21, 2009**, and shall submit a complete Clearing and Grading Permit application not later than **February 27, 2009**. Additional information, if any, required by DDES shall be provided by the appellants within reasonable time periods to be specified by DDES, and the permit shall be picked up and restoration completed not later than **September 15, 2009**.

Failure by the appellants to comply with any of the foregoing deadlines, unless extended by DDES, will result in imposition and accrual of the penalty set forth in the April 18, 2008 Notice and Order, commencing on the first business day following the applicable date of failure to comply with this decision.

ORDERED this 19th day of November, 2008.

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James N. O'Connor  
King County Hearing Examiner *pro tem*

### NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

### MINUTES OF THE JUNE 25, 2008, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E06G0466A.

James N. O'Connor was the Hearing Examiner in this matter. Participating in the hearing were Jeri Breazeal and Matt Caskey, representing the Department; William Currier, the Appellant and Jessica Currier.

Upon agreement by the parties, the record of the public hearing conducted on file no. E06G0466 was incorporated into the record of the hearing on this appeal, case no. E06G0466A.

The following Exhibits were offered and entered into the record:

Exhibit No. 1	DDES staff report to the Hearing Examiner for June 25, 2008
Exhibit No. 2	Copy of the Notice & Order issued April 18, 2008

Exhibit No. 3	Copy of the Notice and Statement of Appeal received May 7, 2008
Exhibit No. 4	Copies of codes cited in the Notice & Order
Exhibit No. 5	Copy of a letter to William Currier from Matthew Caskey dated November 9, 2007, re: Pre-application A07P0130
Exhibit No. 6a	Photographs (2) of road dated April 28, 2005
Exhibit No. 6b	Photographs (3) of road dated August 9, 2006
Exhibit No. 6c	Photographs (2) showing clearing dated October 19, 2006
Exhibit No. 6d	Photographs (12) showing road, trees that were taken down dated October 26, 2006
Exhibit No. 6e	Photographs (6) showing trees that were cut down dated February 1, 2008
Exhibit No. 7	Aerial dated 2005 of Currier property and aerial dated 2007 of Currier property
Exhibit No. 8	Old Currier file E06G0466
Exhibit No. 9	Currier's Report to the Hearing Examiner
Exhibit No. 10	Compliance Certificate for E0400813 dated September 22, 2005
Exhibit No. 11	Photograph showing replacement power poles left year round for winter storm repair dated June 15, 2008
Exhibit No. 12	Emergency Preparedness News – King County dated December 21, 2007 regarding emergency tree removal being exempt from permits and the CAO
Exhibit No. 13	News Release from Ron Sims regarding emergency tree removal
Exhibit No. 14	Impervious surface statement from Chris Sorenson
Exhibit No. 15	Impervious surface statement from Glen Nordquist
Exhibit No. 16	Impervious surface, DDES file photograph E0400813, showing driveway and gate to Currier's neighbors, dated between 2003-2004
Exhibit No. 17	Impervious surface, DDES file photograph E0400813, showing motorhome area parking and van parked on driveway, dated between 2003-2004
Exhibit No. 18	Impervious surface, DDES file photograph E0400813, showing where new driveway is really the old septic access from the street, dated between 2003-2004
Exhibit No. 19a	Photograph of property showing trees/vegetation, septic location, dated June 15, 2008
Exhibit No. 19b-d	Photograph showing property/vegetation, dated June 23, 2008
Exhibit No. 20	Construction Permit for detached garage, issued November 16, 2007
Exhibit No. 21	Site Plan
Exhibit No. 22	DDES notes/attachments on property
Exhibit No. 23	Annotated 2007 aerial
Exhibit No. 24	Jessica Currier's statement